

JOHN B. NELSON
ROBERT KAHRE

IBLA 2001-320

Decided April 15, 2003

Appeal from a decision of the Las Vegas (Nevada) Field Office, Bureau of Land Management, providing notice of noncompliance with Departmental regulations governing use and occupancy of millsites and ordering the removal of items from a millsite claim. N54-90-054N-OCC; NMC 71875.

Affirmed.

1. Mining Claims: Surface Uses--Surface Resources Act:
Occupancy

Public lands may be occupied pursuant to valid millsite claims in accordance with the general mining laws, only for the purpose of prospecting, mining, or processing, and uses reasonably incident thereto. Under 43 CFR 3715.0-5, "occupancy" means full or part-time residence on the public lands, and "residence" includes placing barriers to access, trailers, buildings, or storage of equipment or supplies on the claims. Where the record shows that all of those were found on a millsite, there was "occupancy" and BLM may properly consider whether that occupancy was authorized under the regulations.

2. Mining Claims: Surface Uses--Surface Resources Act:
Occupancy

In order to "occupy" a mill site under the mining laws, a party must comply with the requirements of 43 CFR 3715.2. Where the millsite has not been used for many years, there is no compliance with those requirements as the claimant's occupancy of the millsite is not reasonably incident to legitimate millsite activities, in that it is

unrelated to actual processing operations on the claim, such as development or beneficiation of mineral resources. That is, it cannot be said that there was any processing operations on the claim to which appellants' occupancy related or that the claimant's use of the site constituted substantially regular work or involved observable on-the-ground activity that BLM may verify. It is no defense that appellant hopes or expects to receive mineral material for processing at the site in the future.

3. Mining Claims: Surface Uses--Surface Resources Act: Occupancy

In the event of noncompliance with the occupancy regulations, BLM may either order a millsite claimant to cease (temporarily or permanently) all or any part of a his use or occupancy or issue a notice of noncompliance requiring corrective action. The extent of permissible occupancy is directly related to the extent of processing activity conducted on a millsite claim. The structures and equipment maintained on site must be related to and commensurate with the operations. Where there was no activity on the site, BLM was justified in directing claimants to remove all of their equipment from the site.

APPEARANCES: John B. Nelson and Robert Kahre, pro sese; Mark R. Chatterton, Assistant Field Manager, Las Vegas (Nevada) Field Office, Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

John B. Nelson and Robert Kahre have appealed from the June 6, 2001, decision of the Las Vegas (Nevada) Field Office, Bureau of Land Management (BLM), providing notice of noncompliance with Departmental regulations governing use and occupancy of millsites and ordering the removal of items from their millsite claim.

This case concerns the White Park No. 1 millsite claim, which was located on May 24, 1990, in Clark County, Nevada. 1/ The record contains a BLM surface use

1/ The claim is the White Park No. 1 or Mill Site No. 1 millsite claim and is located south of Mesquite, Nevada, in the SE¹/₄ NE¹/₄ SW¹/₄ sec. 21, R. 71 E., T. 13 S., MDM, Clark County, Nevada. It consists of approximately 5 acres, although BLM has determined that an area of approximately 6 acres has been disturbed by activities at the claim.

determination dated May 9, 2001, summarizing BLM's view of the situation at the claim as follows:

The Mill Site No. 1 mill site claim is a dependent mill site owned by Robert Kahre, John B. Nelson, and Richard Wellman. The mill site claim is 5 acres in size. The claimants are in the process of obtaining permits to explore lands owned by the State of Arizona, near Florence, Arizona. They also claim to have agreements in place for processing materials from claims near the mill site, but presented no evidence during the inspection. A letter * * * sent to the claimants on January 16, 2001, requesting information on the claims and agreements elicited no response as to the agreements. At the time of the inspections[,] none of the claims [was] being mined. Operations taking place on the Mill Site No. 1, mill site claim consist mainly of non mining related occupancy. The occupancy consists of two buildings and a fence with locked gate. Equipment potentially related to mining and milling operations shows little signs of use. There are no stockpiles of materials for processing on the site.

(BLM Mineral Report at 3.)

The record shows that the claim has not been used since it was acquired by the current owners in June 1997. Prior to June 1997, the claims in question were owned as part of the White Park Mine, serial number N54-90-054N. The site was used during that time to process mineral material, operating under the 5-acre disturbance rule. An "existing occupancy notification" was filed by the claimholders on October 9, 1996.

The record shows that Robert Kahre, Richard Wellman, and John B. Nelson purchased seven millsites "previously known as and Owned by White Park R & D, Ltd." on June 17, 1997, including the claim at issue herein. On October 21, 1997, BLM's site inspector noted "[n]o activity at site," and "[n]o evidence of any recent activity other than painting." On October 30, 1998, the BLM inspector noted a "lack of activity"; "[n]o evidence of any recent activity other than painting about a year ago"; and "New operator does not have operating permit."

On November 9, 1998, BLM sent Kahre a letter concerning his occupancy of the site, assigning it case number N54-90-054N-OCC. BLM stated:

If an operator had occupancy on public lands, [it was] required to notify BLM and bring the site into compliance with the 3715 regulations by August 17, 1997. * * * Based on our review, your site has occupancy but is not in compliance for the following reasons:

- Your failure to submit an amended notice to N54-90-054N as required under *43 CFR 3809* and *3715*
- A very long period of non-operation going back to the previous operator's tenancy
- No permits from [Nevada Division of Environmental Protection (NDEP)] to process at this site
- No documentation supplied this office concerning permits for septic and compliance with local building codes.

BLM allowed Kahre 15 days to provide the following information, as well as a detailed map identifying the site and the placement of the items specified below, and a written description of the occupancy:

- How the existing occupancy is reasonably incident?
- How the occupancy meets the conditions specified in [43 CFR] 3715.2 and 3715.2-1 * * * .
- Where are the temporary or permanent structures placed for occupancy?
- The location of and reason you need enclosures, fences, gates, and signs intended to exclude the general public;
- The location of reasonable public passage or access routes through or around the area to adjacent public lands; and
The estimated period of use of the structures, enclosures, fences, gates, and signs, as well as the schedule for removal and reclamation when operations end.
- Submit documentation of compliance with [43 CFR 3715.5(e)] to this office.
- Submit notice information as required by *43 CFR 3809*.

BLM warned that failure to bring the site into compliance would result in actions described at 43 CFR 3715.7-1 and 3809.3-2(a). That letter was returned as unclaimed, but was remailed on December 3, 1998.

On January 22, 1999, Kahre responded, stating that the "estimated beginning date" for their "period of operation" was May 1999 and that it was intended to "run indefinitely." (Outline for Mining Notice Submitted Under the 43 CFR 3809 Regulations (3809 Notice) at 2-3.) Kahre stated as follows concerning his proposed operation:

We have memorandums of understandings with several local mineral claim holders, and are not certain yet as to what type of processing operation we will be conducting. This will be clearer once we get further into our negotiations and analysis o[f] the raw ore.

There are no plans for new surface disturbances or structures on the White Park millsite. We will be cleaning up existing structures and disturbances. There is a substantial amount of clean up required at this time.

(3809 Notice at 3.) In explaining how his occupancy was reasonably incident, he reiterated his plans to conduct processing operations and that more details as to extraction methods would be available once negotiations progressed, noting that “there are structures on the site which are being maintained and are directly involved in the mineral processing.” (Use and Occupancy Notice Under 43 CFR Part 3715 (3715 Notice) at 1.) Kahre assured BLM that

[w]e will have a fully operational millsite for processing both local and out of state ore. Our work will also include assembly and/or maintenance of equipment, physical improvements, and procurement of supplies necessary for continuing operations[,]

and that “[m]ineral extraction of other mineral claims [was] presently under negotiation.” (3715 Notice at 2.) Kahre asserted that a caretaker and fencing and gates would be necessary at the site to guard valuable mineral ores (silver and gold) and to protect heavy equipment and chemical agents stored at the claim from vandals. He stressed that there was no plan to end operations, so that the use of the structures would be ongoing.

None of these plans eventuated. BLM’s August 12, 1999, and July 6, 2000, inspection reports indicated that there was no activity at the site and that the operator was not permitted with NDEP. On October 4, 2000, BLM did an extensive “Compliance Inspection Report” mapping the surface disturbance and again observing that there was no activity at site and that the operator was not permitted with NDEP. An inspection report dated January 10, 2001, noted that the “site shows no recent signs of use” and that there “were no stockpiles of materials for processing on the site.”

On January 16, 2001, BLM sent the letter referenced above in the May 2001 surface use determination requesting that it be informed of any progress on obtaining approval for exploration. The record contains no reply.

BLM prepared its surface use determination in May 2001 and on June 6, 2001, issued the notice of noncompliance decision, containing the following conclusions:

- 1) No milling or mining operations are taking place on the mill site that would require the level of occupancy which is taking place.

- 2) Activities on the site do not constitute substantially regular work.
- 3) Activities and equipment on the site cannot be reasonably calculated to lead to the extraction and beneficiation of minerals.
- 4) Operations do not involve observable on-the-ground activities that BLM may verify under [43 CFR] 3715.7.
- 5) The primary use of the mill site is not for mining or milling purposes. The equipment present that could be reasonably incident to a theoretical operation is not being put to use. There are no mining operations taking place on the site.
- 6) Since no valuable minerals are exposed, the present occupancy is beyond that needed to protect exposed, concentrated or otherwise accessible valuable minerals from theft or loss.
- 7) The occupancy is not needed to protect from theft or loss appropriate, operable equipment which is regularly used and cannot be protected by means other than occupancy. Equipment on the site is not being used and could be removed and stored off-site.
- 8) The occupancy is not needed to protect the public from appropriate, operable equipment which is regularly used, and if left unattended, creates a hazard to public safety.
- 9) The occupancy is not needed to protect the public from surface uses, workings, or improvements which, if left unattended, create a hazard to public safety. The occupancy and storage of equipment that is not being used create a hazard to the public. Removal of the occupancy and equipment would eliminate any perceived need for the occupancy.
- 10) The site is not located in an area so isolated or lacking in physical access as to require the mining claimant, operator or workers to remain on the site in order to work a full shift of a usual and customary length. The site is within a short travel distance of the Las Vegas, Nevada metropolitan area, Mesquite, Nevada and several other rural communities.
- 11) Having equipment, machinery and other personal property on the site that is not being operated, or which is inappropriate for the

purposes to which the mill site is actually put, causes unnecessary and undue degradation of the public lands and resources.

(BLM Decision at 1-2.) BLM concluded its decision with the following findings and order:

The activities taking place on these claims are found not to be reasonably incident to prospecting, mining, or processing operations within the meaning of 30 USC 612(a), 43 CFR 3712.1 and 43 CFR 3715. Therefore, under the authority of 43 CFR 3715.7-1(c) you are ordered to remove the locked gate, the fence, all buildings, equipment, personal items, trash and debris from the claims [sic]. You may not place any of these items on public lands without prior permission. The work must be completed within thirty days of receipt of this order, unless you take an appeal forward to the Interior Board of Land Appeals (IBLA). If an appeal is filed then you must cease the use and occupancy within thirty days from the date the IBLA affirms the BLM's order.

On July 3, 2001, Nelson and Kahre (appellants), who identified themselves as owners of record of the "White Park Mill Site" filed a joint notice of appeal of BLM's decision and request for stay. ^{2/} Appellants included with their appeal documents a copy of a mineral exploration permit issued by the State of Arizona State Land Department ostensibly authorizing them to prospect for minerals on State lands named therein. It also contains a copy of a notice of location of a mining claim located on Federal lands in Wyoming in June 1997. Appellants note that "initial mineral assays" of the Arizona lands "showed sufficient amounts of silver and gold to [warrant] further expenditures for exploration and development of mining and reclamation plans." (Notice of Appeal (NA) at 4.) They state that the millsite will be used to complete off-site analysis of ore from those lands and to mill and process that ore "when it is determined if the deposit has sufficient mineral content and is economically feasible to mine." (NA at 5.) They indicate that the millsite will also "be needed to extract the fine gold from the concentrates obtained from the" Wyoming claim. *Id.* Appellants also allude to other possible sources of ore for custom milling at the millsite and previous unsuccessful attempts to secure ore to be processed there. *Id.* at 6. As to their plans to use the millsite, appellants state:

Development of any mineral claim or deposit [is] dependent upon access to the same, meeting regulatory requirements, and the feasibility of mining, transporting, milling, and processing the minerals.

^{2/} Although appellants also indicated that Richard Wellman is an owner of record, he did not join the appeal.

Appellants have been actively pursuing the acquisition of valid and feasible claims by acquiring the claims, permits, or leases ourselves, or by negotiating contracts with other mineral claim holders. When the mineral claims, permits, etc., are secured, observable on-the-ground activities will occur on the White Park Mill Site.

(NA at 7.)

By order dated August 22, 2001, we stayed the effectiveness of BLM's decision finding activities on millsite claims not to be reasonably incident to mining and ordering the removal of items from the claim.

We note initially this the present case is not a proceeding to declare the subject millsite null and void because of use and occupancy for other than mining or milling purposes. Rather, it is a BLM determination that the activities taking place on these claims were not reasonably incident to prospecting, mining, or processing operations within the meaning of 30 U.S.C. § 612(a), 43 CFR 3712.1 and 43 CFR 3715 and it orders the claimant, under the authority of 43 CFR 3715.7-1(c), to remove the locked gate, the fence, all buildings, equipment, personal items, trash, and debris from the claim. Accordingly, our decision affirming BLM herein does not invalidate the claim, and no hearing is necessary, as the record shows an absence of activities on the claim. See Richard Oldham, 146 IBLA 220 (1998); Michael Bosch, 119 IBLA 370, 374 n.8 (1991); Jim D. Wills, 113 IBLA 396 (1990); compare, United States v. James L. Pence, 157 IBLA 124 (2002).

[1] While a mining claimant has the right of possession and enjoyment of the surface of mineral land encompassed by a valid lode or placer mining claim under 30 U.S.C. §§ 26 and 35 (2000) and may thus engage in prospecting, mining, and processing operations on the claim, as well as on other non-mineral land encompassed by a valid millsite claim under 30 U.S.C. § 42 (1994), it is now well established that the claimant's ability to otherwise use and occupy the claim, prior to patent, is limited by section 4(a) of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 612(a) (2000), and Departmental regulations at 43 CFR Subpart 3715. Public lands may be occupied pursuant to valid millsite claims in accordance with the general mining laws, only for the purpose of prospecting, mining, or processing, and uses reasonably incident thereto. 30 U.S.C. § 612(a) (2000). Mining activities are also subject to the regulations at 43 CFR Subpart 3715, which are intended to limit the residential occupancy of mining and millsite claims to that permitted by section 4(a) of the Surface Resources Act. United States v. Pence, 157 IBLA at 125 n.3; see 43 CFR 3715.0-1 and 3715.0-5.

We find that the site was being "occupied" at the time of BLM's decision within the meaning of the regulations. "Occupancy" is defined therein as follows:

Occupancy means full or part-time residence on the public lands. It also means activities that involve residence; the construction, presence, or maintenance of temporary or permanent structures that may be used for such purposes; or the use of a watchman or caretaker for the purpose of monitoring activities. Residence or structures include, but are not limited to, barriers to access, fences, tents, motor homes, trailers, cabins, houses, buildings, and storage of equipment or supplies.

43 CFR 3715.0-5. Thus, the term “residence” includes barriers to access, trailers, buildings, or storage of equipment or supplies. *Id.* The record shows that, in January 2001, all of those were present at the site.

[2] Such occupancy is not barred in all cases, but depend on the type of activity being undertaken by the claimant. In order to “occupy” the public lands under the mining laws for more than 14 days in any 90-day period within a 25-mile radius of the initially occupied site, the claimant’s activities on the land must:

- (a) Be reasonably incident;
- (b) Constitute substantially regular work;
- (c) Be reasonably calculated to lead to the beneficiation of minerals;
- (d) Involve observable on-the-ground activity that BLM may verify under [43 CFR] 3715.7; and
- (e) Use appropriate equipment that is presently operable, subject to the need for reasonable assembly, maintenance, repair or fabrication of replacement parts.

43 CFR 3715.2.

The record shows that appellants’ occupancy of this claim is not reasonably incident to legitimate millsite activities. The term “reasonably incident” is defined to include “those actions or expenditures of labor and resources by a person of ordinary prudence to prospect, explore, define, develop, mine, or beneficiate a valuable mineral deposit.” 43 CFR 3715.0-5. It follows that any occupancy by the claimant must, in the case of a millsite, be related to actual processing operations on the claim, such as development or beneficiation of mineral resources. The record shows that no activities relating to development or beneficiation of mineral resources had occurred for many years prior to the issuance of BLM’s decision here. In fact, the record shows that the site has been essentially abandoned for many years. Accordingly, it cannot be said that there was any processing operations on the claim to which appellants’ occupancy related. Nor can it be said that appellant’s use of the site “constitute[s] substantially regular work” (43 CFR 3715.2(b)) or that it “involve[s] observable

on-the-ground activity that BLM may verify” (43 CFR 3715.2(d)). It is no defense that appellant hopes or expects to receive mineral material for processing at the site in the future. See Bradshaw Industries, 152 IBLA 57, 64 (2000); 43 CFR 3715.5-1. The long period of inactivity justified BLM’s actions here. ^{3/} See David E. Pierce, 153 IBLA 348, 358 (2000).

[3] In the event of noncompliance, BLM may either order a claimant to cease (temporarily or permanently) all or any part of a his use or occupancy (43 CFR 3715.7-1(b)) or issue a notice of noncompliance requiring corrective action. 43 CFR 3715.7-1(c). The extent of permissible occupancy is directly related to the extent of processing activity conducted on a millsite claim: The structures and equipment maintained on site must be related to and commensurate with the operations. David E. Pierce, 153 IBLA at 358; Bradshaw Industries, 152 IBLA at 63. That rule is consistent with the requirements that occupancy must constitute substantially regular work (43 CFR 3715.2(b)), that it be reasonably calculated to lead to the beneficiation of minerals (43 CFR 3715.2(c)), and that it involve observable on-the-ground activity that BLM may verify under 43 CFR 3715.7. 43 CFR 3715.2(d). Since there was no activity on the site, BLM was justified in directing appellants to remove all of their equipment from the site.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

David L. Hughes
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

^{3/} We note that, although the effect of BLM’s order to remove equipment was stayed pending appeal, appellants have not provided us with any evidence indicating that the millsite has been used during the pendency of their appeal.